Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
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Broadcast Localism	)	MB Docket No. 04-233
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REPLY COMMENTS OF ALLIANCE FOR BETTER CAMPAIGNS AND CAMPAIGN LEGAL CENTER

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SUMMARY

The Alliance for Better Campaigns and the Campaign Legal Center commend the Commission for inquiring about localism issues. We respectfully request that the Commission assess the failures of the current market's public interest services and promptly initiate a rulemaking proceeding to develop guidelines that enhance broadcasters' service to local communities. Further, localism in broadcasting will be enhanced by the adoption of standardized disclosure forms and processing guidelines as part of license renewal proceedings.

We present three main points in these reply comments. First, broadcasters believe that they have satisfied their public interest requirements through "a plethora of local news, public affairs, and public service announcements".[1] However, scores of recent studies and overwhelming public opinion expressed in this docket and in the Commission's recent localism hearings demonstrate that broadcasters are failing to fulfill their public interest obligations because they do not provide adequate local civic and political discourse. This failure is particularly troubling because Congress and the courts have consistently affirmed that broadcaster license holders must provide for these local needs.

Second, the Commission has the duty and the authority to study the current market and reevaluate previous judgments that led to the repeal of localism regulations in the 1980s. At that time, the Commission, relying on a prediction that broadcasters would provide local programming without such guidelines, eliminated many of its public interest requirements. However, the Commission explicitly reserved the right to re-regulate in the public interest if

[1] Comments of the National Association of Broadcasters, MB Docket No. 04-233 (filed Nov. 1, 2004) ("NAB Comments") at ii.

"the market is perceived to work imperfectly."[2] Since the elimination of programming guidelines, locally oriented programming has suffered significantly in both quantity and quality. Broadcast practices in the last two decades show that market forces alone do not result in local broadcasting that adequately serves the public interest. Establishing clear guidelines that address public interest obligations will help ensure that our local communities have access to the programming they require.

Third, in addition to developing public interest rules appropriate for today's market, the Commission has the authority and duty to modify license renewal procedures to further ensure adequate public interest broadcasting. The Commission should 1) adopt policies that would strengthen disclosure requirements for broadcast station programming, and 2) adopt processing guidelines that allow broadcasters who fulfill the guidelines to easily receive license renewals at the staff level. Strengthening disclosure requirements will help to ensure that broadcasters meet their licensing and public interest obligations and will make it easier for the Commission and the public to determine if a licensee has served the public interest. Processing guidelines to incentivize programming aimed at the particular needs of local communities would also serve the public interest by rewarding broadcasters who fulfill their public interest obligations.

[2] *In the Matter of Deregulation of Radio*, 73 FCC 2d 457, 500 (1979).

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I. LOCAL POLITICAL AND CIVIC DISCOURSE IS AT THE HEART OF THE PUBLIC INTEREST STANDARD FOR BROADCASTERS

When broadcasters accept their licenses to operate on the publicly owned airwaves, they pledge to serve the "public interest, convenience and necessity."[3] Congress mandates that broadcast license holders act as "public trustees" of the airwaves and foster programming that meets the informational and educational needs of the American people. It is broadcasters' service to their local communities, particularly with regard to political and civic discourse, that is at the heart of the public interest standard.

In the absence of quantifiable public interest guidelines from the Commission, too many broadcasters have lost the appropriate balance between commercial interests and public service. The Federal Communications Commission (FCC) must act now to ensure that public interest obligations – as embraced by the Supreme Court when it said "it is the right of the viewers and listeners, not the right of the broadcasters which is paramount" – are not given short shrift but fostered and upheld.[4]

A. Broadcasters' Public Interest Obligations Go Beyond Good Corporate Citizenship

The National Association of Broadcasters (NAB) claims that organizing charitable events and promoting donation drives is a core way they meet their public interest obligations.[5] We acknowledge that members of the broadcast industry often engage in this sort of good corporate citizenship. But most corporations participate in some sort of community service – whether it is raising funds for needy individuals or charities, encouraging employees to give of their time and resources to the local community, or simply making contributions to worthy causes. While these good deeds are commendable, they do

[3] 47 U.S.C. 307(a), 309(a), 310(d).
[4] *Red Lion v. FCC*, 395 U.S. 367 (1969).
[5] NAB Comments at 21.

not constitute fulfillment of broadcasters' statutory obligations to enhance local civic discourse over our publicly owned airwaves.

The public trustee model established for the broadcast industry by Congress requires local service above and beyond good corporate citizenship. Broadcasters should strive to "foster diversity of programming, ensure candidate access to the airwaves, provide diverse views on public issues, encourage news and public affairs programming, promote localism, [and] develop quality programming for children."[6] Yet numerous studies have documented broadcasters' failures in these areas.[7] Still the industry continues to point to community service efforts as evidence of meeting their public interest obligations. However, donations made by good-willed individuals and companies to fundraisers ought not to be claimed by the broadcast industry as its own public service. It is vital that the Commission clarify that community service efforts alone do not constitute fulfillment of the industry's statutory public interest obligations. We encourage the Commission to set forth clearly-defined standards for local public service, such as those proposed by the *Public Interest, Public Airwaves Coalition*.[8]

[6] Advisory Committee on Public Interest Obligations of Digital TV Broadcasters, *Charting the Digital Broadcasting Future*. at 17 (Dec. 18, 1998), *available at* http://www.ntia.doc.gov/pubintadvcom/piacreport.pdf (last visited Dec. 29, 2004).
[7] *See, e.g.*, Comments of Alliance for Better Campaigns and Campaign Legal Center, MB Docket No. 04-233, filed Nov. 1, 2004; Comments of Alliance for Community Media, MB Docket No. 04-233, filed Oct. 27, 2004, at 5.
[8] See Attachment A, PIPA Coalition's proposed Processing Guidelines.

B. The Courts Have Long Recognized And Upheld Broadcasters' Public Interest Obligations

The public trustee model was first established by the Radio Act of 1927, and was further refined by the Communications Act of 1934. Broadcasters needed the federal government to regulate the publicly owned spectrum in order to prevent interference. Thus, in exchange for a free license to operate on an assigned frequency within a defined geographic area, broadcasters pledged to serve "the public interest." Unfortunately, the public interest standard has been only vaguely defined. The ambiguity surrounding public interest obligations has led to a number of legal battles, in which the courts have consistently found that broadcasters must provide citizens with local, civic, and educational programming that represents diverse viewpoints. Below are some of the court's findings:

- *Office of Communications of the United Church of Christ v. FCC* (1966): Found that broadcasters have enforceable public interest obligations, and that licenses can be revoked for failure to serve the public interest.[9]
- *Red Lion v. FCC* (1969): Established that in First Amendment matters, "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[10]
- *CBS, Inc. v. FCC* (1981): Secured reasonable access for candidates and enlarged the political programming responsibilities for broadcasters. [11]
- *FCC v. League of Women Voters of California* (1984): Recognized that the government must "seek to assure that the public receives through [the broadcast] medium, a balanced presentation of information on issues of public importance that otherwise might no be addressed if control of the medium were left entirely in the hands of those who and operate broadcasting stations."[12]
- *Turner v. FCC* (1994): Emphasized all viewpoints on broadcast airwaves should be represented fairly for viewers and listeners.[13]

Local civic and political discourse is necessary for a healthy and vibrant democracy. Commissioner Jonathan Adelstein reiterated this need for discourse as he stated at a *Public Interest, Public Airwaves Coalition* press conference in July 2004:

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[9] *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).
[10] *Red Lion v. FCC*, 395 U.S. 367, 390 (1969).
[11] *CBS, Inc. v. FCC*, 453 U.S. 367 (1981).
[12] *FCC v. League of Women Voters of California*, 468 U.S. 364, 375 (1984).
[13] *Turner Broadcasting System, Inc. v. FCC*, 512 U. S. 622 (1994)

> "The American public doesn't need to read the many studies that show declining election coverage to know something's missing. People already know they aren't getting enough in-depth coverage of local civic affairs and elections. They struggle to find shows that tell them what the candidates' real plans are, but they're frustrated to find only horserace coverage - who's ahead and who's behind - and negative ads. ...Broadcasters have a social compact with the government - they get licenses to use public airwaves in return for agreeing to serve their local communities. The government is supposed to enforce that bargain. ...So let's chart a course toward more coverage of local civic and electoral affairs. Let's inspire more civic participation in our society. Let's reaffirm the social compact of broadcasting."[14]

It is time for the Commission to establish clear public interest guidelines for local civic discourse so that the needs of the public will be met.

C. The Broadcast Industry's Record Is One Of Failure, Justifying New Guidelines From The Commission On Matters Of Localism And Civic Discourse

Broadcasters are statutorily obligated to serve the public interest; however, there is a well-documented record of failure on this front, as described extensively in our original comments in this proceeding. A quick review:

- Less than one-half of one percent (0.4%) of programming on the typical television station is devoted to local public affairs.[15]
- In the seven weeks leading up to the 2002 midterm elections, the majority (56 percent) of top-rated half-hour news broadcasts did not contain a single campaign story.
- In 2000, the typical local station aired little more than one minute per night (74 seconds) of candidate-centered discourse in the month before Election Day.[16]
- News about politics and government accounts for only about 10 percent of stories on local news. By contrast, crime and criminal trials account for 24 percent of stories.[17]
- In 2002, there were 174 major candidate debates in 10 states, but 100 (58 percent) were not televised. Network affiliates failed to televise 127 (73 percent) of these debates. Only 57 (32.8 percent) were covered live.[18]

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[14] FCC Commissioner Jonathan Adelstein, Remarks before the Public Interest, Public Airwaves Press Conference Washington, DC (Jul. 19, 2004) (transcript available at http://www.mediachannel.org/views/dissector/affalert233.shtml).

[15] Alliance for Better Campaigns, *All Politics is Local: But You Wouldn't Know it by Watching TV*, *available at* http://www.bettercampaigns.org/reports/display.php?ReportID=12 (last visited Dec. 29, 2004).

[16] Lear Center Local News Archive (USC Annenberg School and the University of Wisconsin), *Local TV News Coverage of the 2000 General Election* (Feb. 5, 2001) *available at* http://learcenter.org/pdf/campaignnews.PDF (last visited Dec. 29, 2004).

[17] The State of the News Media 2004: An Annual Report on American Journalism. Project for Excellence in Journalism, *available at* http://www.stateofthenewsmedia.org/narrative_localtv_contentanalysis.asp?cat=2&media=6 (last visited Dec. 29, 2004)

- The majority (57 percent) of all television stations did not air local public affairs programs of at least 30 minutes once a week in 2003.[19]

The National Association of Broadcasters dismisses these failures by arguing that the record is incomplete.[20] Ironically, the industry opposes increasing public file requirements to include better reporting of the amount and nature of public affairs programming, as well as proposals for mandatory programming archives.[21] Such tools would not require stations to make public any information that had not already been disseminated over the airwaves to the public at large. Rather, by allowing the public to examine exactly what a broadcaster aired after the fact, it would ease what would otherwise be an insurmountable burden on citizens and public interest groups. For broadcasters, recording programming or tracking public affairs programming is no more burdensome than other reporting requirements which the Supreme Court has found "simply run with the territory" in broadcasting.[22] Disclosure of such information would aid the Commission in its role as steward of the publicly owned airwaves by helping it to determine whether licensees are truly serving the public interest.

The NAB further argues that local broadcasters are already supplying sufficient political discourse by citing a poll it conducted in late 2004 which found that 89 percent of voters believe that broadcasters provide the "right amount" or "too much" time covering the elections.[23] However, the 89 percent figure was in response to a question about the "amount" not the "quality" of election coverage on local television stations. Those polled said stations

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[18] Committee for the Study of the American Electorate, *Debates Held, Debates Not Seen: Nearly Two-Thirds of 2000 Debates for Governor, U.S. Senate and Congress Not Televised* (June 2002). Committee for the Study of the American Electorate, *2002 Governor, U.S. Senate and House Debates not Televised by 82 Percent of Stations; Nearly 60 Percent of Debates Go Untelecast* (Aug. 17, 2004).
[19] NAB Comments at 13.
[20] NAB Comments at 3.
[21] *See, e.g.* Comments of National Association of Broadcasters, MB Docket No. 04-232, filed Sep. 27, 2004.
[22] *McConnell v. FEC*, 124 S.Ct. 619, 714 (2003).
[23] NAB Comments at 50.

had spent enough time covering the elections, but less than half described the coverage as the "most helpful" source of campaign information.

It is also notable that the question did not differentiate among reporting on the presidential race (which everyone would agree received enormous attention in 2004) versus reporting on congressional, statewide or local races. That may be because a recent study by the Lear Center Local News Archive found that "[a]s the campaign season entered its most intense period, nearly eight out of ten stories on local television news were about the presidential race, rather than about campaigns for Congress or local offices. In markets with U.S. Senate races, little more than four percent of campaign stories on local news covered them." In addition, much (45 percent) of the coverage provided on local television focused on the strategy or horserace aspects, not the candidates' records or issue proposals (29 percent).[24]

At a series of public hearings conducted by the Localism Task Force in 2003 and 2004, a number of citizens expressed outrage over broadcasters' failures:

- "[M]y concern is that while news may be local, it still is often superficial and does little to serve community needs. To give an example, following …the State of the Union address on Tuesday, I watched what I think was…our local CBS affiliate, and the first eight minutes they ran ten stories, that's less than a minute a story. Certainly not enough time to give quality or in-depth information. And there was no story I heard about the State of the Union address or how it affects us here in San Antonio."[25]

[24] "Local TV News Ignores State and Local Campaigns," Lear Center Local News Archive (October 21, 2004) http://www.localnewsarchive.org/pdf/LCLNARelease2004.pdf.
[25] Localism Task Force meeting, comment from audience member, Jan. 28, 2004, San Antonio, TX, *available at* http://www.fcc.gov/localism/.

- "If you ask me a question about – do we have even slight reporting on Central and… South America, I have to tell you we don't even have local reporting. I think that Latinos are not covered. I don't think the African-American community is covered, I don't think that communities that are disproportionately poor are covered. As I stated, the airwaves belong to us. And if the airwaves belong to the people, then the people must have a voice, and we do not have a voice."[26]
- "[S]tarting on June 2nd there will be people running for city council, there will be people running for state senate in November, and there has been essentially no television coverage of these very important races that are very important to our communities."[27]

Given broadcasters' repeated failures to provide viewers with the local civic affairs coverage they need to be informed and engaged citizens, it is time for the Commission to initiate a Notice of Proposed Rulemaking (NPRM) to clearly define the public interest obligations of broadcasters with regard to localism.

II. THE FCC SHOULD PROMPTLY BEGIN A RULEMAKING PROCEEDING TO DEVELOP LOCALISM RULES BECAUSE MARKET FORCES ALONE HAVE NOT RESULTED IN ADEQUATE PUBLIC INTEREST SERVICE

The FCC is obliged to assess the state of localism in today's broadcast market. The FCC relied on predictive judgments when repealing the localism obligations of broadcasters in the 1980s, envisaging that market forces would ensure localism in broadcasting. However, those predictions have not proved correct and the Commission must now assess the actual state of the market and develop localism obligations to help ensure that broadcasters appropriately serve local communities.

From its inception, the Commission has regulated the programming of broadcast licensees.[28] Even now it requires licensees to air a minimum amount of educational and informational programming for children.[29] Originally, however, minimum public interest

[26] Localism Task Force meeting, comment from Lydia Camarillo, Vice President of Southwest Voter Registration Education Project, Jan. 28, 2004, San Antonio, TX, *available at* http://www.fcc.gov/localism/.
[27] Localism Task Force meeting, comment from audience member, May 26, 2004, Rapid City, SD, *available at* http://www.fcc.gov/localism/.
[28] *In the Matter of Deregulation of Radio*, 73 FCC 2d at 465.
[29] *See* 47 U.S.C. §303(b).

programming requirements were much more substantive. Indeed, when the first Radio Act was passed in 1927, the Act's sponsor stated that the basis for the Act was public service to listeners.[30] The Commission concluded that such public service "can only be rendered through programming and thus Congress saw that the regulatory body that they were creating would have the authority to act in that area where required by the public interest."[31]

In the early 1980's, the Commission eliminated many public interest requirements.[32] However, it acknowledged that regulation would still be in the public interest in those situations "in which the market is perceived to work imperfectly."[33] The current market situation makes such regulation necessary again. Studies have shown that broadcasters are airing less and less locally oriented, political and public interest programming.[34] For example, in its comments in this proceeding, the Radio-Television News Directors Association (RTNDA) reveals that viewers believe stations are overly concerned with the desire to make profits and increase ratings.[35] Also, over 50% of the public perceives that the media do not cover stories that are important to public.[36]

Although the National Association of Broadcasters (NAB) states that the Commission does not have a sufficiently thorough record to create new localism requirements,[37] the comments received under this Notice of Inquiry and testimony given at FCC-sponsored localism hearings around the country provide such a record. Numerous studies have been

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[30] *In the Matter of Deregulation of Radio*, 73 FCC 2d at 464.
[31] *Id*.
[32] Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 FCC 2d 1076 (1984).
[33] *In the Matter of Deregulation of Radio*, 73 FCC 2d at 500.
[34] *See, e.g*., *Local TV News Coverage of the 2004 General Elections, Interim Report, available at* http://www.learcenter.org/pdf/LCLNAInterim2004.pdf (last visited Nov. 17, 2004); *Local TV Coverage of the 2002 General Election, available at* http://learcenter.org/pdf/LCLNAReport.pdf (last visited Nov. 17, 2004); *Local TV Coverage of the 2000 General Election, available at* http://www.learcenter.org/pdf/campaignnews.PDF (last visited Nov. 17, 2004).
[35] *2003 Local Television News Study of News Directors and the General Public*, Comments of Radio-Television News Directors Association, MB Docket No. 04-233, filed Nov. 1, 2004, Appendix at 31.
[36] *Id*. at 36.
[37] NAB Comments at 6.

submitted to show that broadcasters are not serving the needs of local communities.[38] In addition to the information provided by the public, the FCC itself has indicated that it will commission studies to assess broadcasters' service to their local communities.[39]

Moreover, the public overwhelmingly supports regulation to encourage local programming, as can be seen by the number of comments received in this proceeding, and by the overwhelming public response to the localism hearings.[40] In fact, Chairman Powell himself recognized the overwhelming public support for increased localism in broadcasting when he announced the creation of the Localism Task Force:

> "During the [media ownership] proceeding and in the months that followed, however, we heard the voice of public concern about the media loud and clear. Localism is at the core of these concerns," Powell said, "and we are going to tackle it head on . . . It is important to understand that ownership rules have always been, at best, imprecise tools for achieving policy goals like localism. That is why the FCC has historically sought more direct ways of promoting localism in broadcasting. These include things such as public interest obligations, license renewals, and protecting the rights of local stations to make programming decisions for their communities."[41]

Despite the evidence of the market's failure to provide adequate localism in broadcasting and the overwhelming public support to increase broadcasters' public interest obligations, industry commenters in this proceeding argue that because the Commission

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[38] *See, e.g.*, Comments of Consumer Federation of America and Consumers Union, MB Docket No. 04-233, filed Nov. 1, 2004 ("CFA/CU Comments"), Appendix B at 7-13 (showing how market concentration creates disincentives for local programming); Comments of American Federation of Television and Radio Artists, MB Docket No. 04-233, filed Nov. 1, 2004 ("AFTRA Comments") at 9 (stating that news operations across the country are closing or are being "centrally cast" without local personnel); Comments of Alliance for Community Media, MB Docket No. 04-233, filed Oct. 27, 2004, at 5 (citing studies detailing the lack of local programming).

[39] *The FCC is gathering statistical information on radio stations' local coverage*, Communications Daily (August 23, 2004) at 11. Robert Ratcliffe, Deputy Chief of the Media Bureau, told a Broadcast-Cable Financial Management Association seminar audience that the FCC is gathering empirical data similar to that obtained for the media ownership proceeding. "We want to know what is going on and what is being done out there," he stated. *Id*. Mr. Ratcliffe also explained that the FCC would soon contract with a company to do the research on radio stations' local coverage, and that a similar study of TV broadcasters will be done later. He further indicated that the FCC will likely seek comment on the research results. *Id*.

[40] For example, in the Localism Hearings Docket No. RM-10803, there are over 800 filings. A search of the *Broadcast Localism* MB Docket No. 04-233 results in over 81,500 filings as of the date of this filing.

[41] *FCC Chairman Powell Launches "Localism in Broadcasting" Initiative*, Press Release (August 20, 2003).

eliminated programming guidelines in the 1980's, it should not reinstate those guidelines.[42] However, when the Commission eliminated those rules, it did so in reliance on a predictive judgment that market forces would be enough to cause broadcasters to air locally oriented programming. In the very case that determined that the 1981 Radio Deregulation was consistent with the Administrative Procedure Act, the court also noted that if market forces were not enough to ensure that broadcasters provide local programming, the Commission should reconsider its deregulation.[43] The court stated that if market forces were not "sufficient … we trust the Commission will be true to its word and will revisit the area in a future rulemaking proceeding."[44]

The Commission is not entitled to merely rely on its prediction of the early 1980's that market forces will provide adequate incentives for broadcasters to offer local programming. "The Commission's necessarily wide latitude to make policy based upon predictive judgments deriving from its general expertise implies a correlative duty to evaluate its policies over time to ascertain whether they work – that is, whether they actually produce the benefits the Commission originally predicted they would."[45] Even after the 1996 Act, the courts warned the Commission to "carefully monitor the effects of its regulations and make adjustments where circumstances so require."[46] Just because the Commission has deregulated an area, that does not mean that it can never regulate in that area again if the market and circumstances warrant such regulation.[47]

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[42] *See, e.g.*, NAB Comments at 19.
[43] *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1438 (D.C. Cir. 1983).
[44] *Id*.
[45] *Bechtel v. FCC*, 957 F.2d 873, 881 (1992).
[46] *Cellco P'ship v. FCC*, 357 F.3d 88, 95 (2004), quoting ACLU v. FCC, 823 F.2d 1554, 1565 (D.C. Cir. 1987) (citing *Bechtel*).
[47] *See, e.g., Prometheus Radio v. FCC*, 373 F.3d 372, 394-95 (3d Cir. 2004). (holding that the 1996 Act's ownership rule mandate does not mean that the Commission can only eliminate rules and never add new ones).

Although industry commenters would wish the Commission to believe otherwise,[48] current market conditions and license renewal procedures make it extremely unlikely that broadcasters will air programming that is responsive to local communities.[49] As the Consumer Federation of America notes, "Concentration of national and local markets into national chains reinforces the tendencies of media to ignore local needs," because economic pressures operate to force local news and public affairs programming off the air.[50]

Thus, the FCC clearly has the authority and the obligation to assess the actual state of the market and determine if the predictive judgments that resulted in the deregulation of broadcasters' public interest obligations have proven correct. We request that the FCC act quickly to review the studies and comments submitted in this proceeding and the localism hearings and issue an NPRM to develop rules that support localism in broadcasting.

III. LICENSE RENEWAL PROCEDURES CAN AND SHOULD BE MODIFIED TO HELP ENSURE LOCALISM IN BROADCASTING

In addition to assessing the current market and issuing an NPRM to develop rules that encourage localism, the FCC should assess the licensing procedures currently in place to determine how they can encourage broadcasters to fulfill their public interest obligations. The license renewal process is an integral part of ensuring that broadcasters fulfill their obligation to serve the public interest. It is here that the Commission can reward those broadcasters that show exemplary performance, and can refuse to renew the licenses of broadcasters that do not adequately serve the public interest. Moreover, when local community members feel underserved, it is extremely difficult for individuals to petition the Commission to deny a broadcast station's license. The current petition to deny process is

[48] NAB Comments at 67.
[49] *See, e.g.*, CFA/CU Comments, Appendix B at 10.
[50] *Id*. at 10-11. *See also* AFTRA Comments at 12 (stating that there is "an overwhelming emphasis on cost cutting and revenue enhancement" among national radio chains.").

extremely complicated, and many citizens do not have the time or the expertise necessary to participate. The Named State Broadcasters assert that the current license renewal process' shifting the "administrative burden" of license renewal to the public is an objective good,[51] but the practical effect of this shift is fewer license challenges. Adoption of the disclosure and processing guidelines described in these comments will help solve these problems by simultaneously easing administrative burdens on the agency while increasing community members' ability to understand broadcasters' obligations and the licensing process.[52]

A. The FCC Has The Authority To Modify License Renewal Procedures

Industry commenters suggest that the Commission has no authority to change the license renewal process. The NAB asserts that because Congress adopted "specific policies concerning the length of the license term, and the standard the Commission must use in granting renewals," that the Commission lacks the authority to change any of its renewal policies.[53]

Apparently, the "specific policy" to which the NAB is referring is the requirement that the Commission only renew a broadcast license if the licensee "has served the public interest, convenience and necessity."[54] It is difficult to understand how the NAB believes this renewal standard could limit the Commission's authority. The Supreme Court describes this standard as "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy."[55] Moreover, when the Commission

[51] Named State Broadcasters Comments at 13.
[52] In fact, disclosure coupled with processing guidelines would be even more administratively efficient because the Commission would not have to make case-by-case determinations of whether the licensee has served the public interest, convenience, and necessity. Currently, under 47 U.S.C. § 309(k), the Commission is only entitled to renew a license if it finds that the licensee has served "the public interest, convenience, and necessity."
[53] NAB Comments at 62.
[54] 47 U.S.C. § 309(k).
[55] *FCC v. Pottsville Broadcasting Company*, 309 U.S. 134, 138 (1940). *See also*, *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1423 (D.C. Cir. 1983).

acts within the confines of the public interest, convenience and necessity, it is accorded great deference.[56]

The NAB argues that under *Chevron*, the Commission is granted no deference in the way it chooses to renew licenses.[57] However, *Chevron* states that when "Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[58] In other words, under *Chevron*, a court must defer to an agency's permissible construction of an ambiguous statute. It is difficult to imagine a stronger case for *Chevron* deference than the general statutory phrase, "the public interest, convenience and necessity." Clearly, Congress intended for the Commission to establish standards to discern whether licensees had in fact served the public interest, and service to the local community is one of those standards.

The NAB asserts that because Congress directed the Commission to increase the license renewal term to eight years and to eliminate the comparative renewal process, the Commission has no discretion to impose any other requirements on the license renewal process.[59] However, the legislative history of the Act only states that Congress intended to eliminate comparative renewal standards,[60] not all renewal standards. If Congress had intended to eliminate all renewal standards, they would have explicitly stated such intent. In

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[56] *Id*. at 1424.
[57] NAB Comments at 63.
[58] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).
[59] NAB Comments at 62.
[60] S. Conf. Rep. No. 104-458, at 164-65. The 1996 Act also provides authority for the FCC to tighten regulations in other contexts. For example, section 202(h) of the 1996 Act allows the FCC to tighten regulations that limit the number of media outlets that one entity can own. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 394-95 (2004).

fact, Congress explicitly created a new standard for renewals, requiring the Commission to consider whether a licensee has served "the public interest, convenience and necessity."

The Named State Broadcasters argue that the 1996 Act limits "the types of materials that the Commission can require the licensee to produce up-front during the renewal process, and also imposes strict standards on the types of behavioral factors the Commission can consider."[61] However, the 1996 Act merely prohibits the Commission from considering "whether the public interest, convenience, or necessity might be served by the grant of a license to a person other than the renewal applicant."[62] It does not limit the Commission duty to consider a renewal applicant's record of service to the public to determine whether the station had served the "public interest, convenience and necessity."

The NAB further argues that any changes the Commission makes to the license renewal process would fail under *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins.*.[63] *State Farm* establishes that if an agency eliminates a rule, it is subject to the same arbitrary and capricious standard that governs the making of rules.[64] *State Farm* only ensures that any localism rule the Commission promulgates will be subject to the same standards as all other Commission rules, the arbitrary and capricious standard.[65] True, there is a presumption against policy changes that are not justified by the record.[66] But the Commission now has evidence before it that the current license renewal process does not ensure that broadcasters serve the needs of their local audiences, and so the Commission is justified in changing that process.

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[61] Named State Broadcasters Comments at 14.
[62] 47 U.S.C. § 309(k)(4).
[63] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). *See* NAB Comments at 21.
[64] *State Farm*, 463 U.S. at 41.
[65] *Id*.
[66] *Id*. at 42.

Furthermore, the Commission's deregulatory initiatives in the early 1980s were a significant departure from longstanding policy. In re-regulating the broadcast industry's public service obligations, the Commission would actually be returning to former precedent, not abandoning it. As the court stated upon review of the *Radio Deregulation Order of 1983*, "[i]n these proceedings the Commission has on its own undertaken to enact a significant deregulation of the radio industry. In so doing it has pushed hard against the inherent limitations and natural reading of the Communications Act."[67] Moving to re-regulate broadcasting should not invoke a higher standard of scrutiny, because the agency is returning to a former position that has already been found to be within its discretion.

The Named State Broadcasters further argue that the Commission should presume that a licensee has served the public interest when its license is due for renewal, just as the Commission assumes a licensee will serve the public interest when its license is first granted.[68] However, there is nothing in the statutory language that requires a presumption of renewal. Instead, the renewal statute authorizes the Commission to grant renewal of a license only if the Commission finds that the licensee has served the public interest, convenience, and necessity.[69] Although a licensee is expected to fulfill its public service obligations when its license is first given, when a record exists to prove whether the licensee has served the public, there is no reason for the Commission to ignore this record.[70]

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[67] *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1443 (D.C. Cir. 1983).
[68] Named State Broadcasters Comments at 33.
[69] "The Commission shall grant the [renewal] application if it finds, with respect to that station, during the preceding term of its license – the station has served the public interest, convenience, and necessity." 47 U.S.C. § 309(k)(1).
[70] When making policy, the Commission is not entitled to rely solely on predictive judgments. It certainly should not be limited to relying on predictive judgments about the behavior of licensees. *See Bechtel v. FCC*, 957 F.2d 873, 881 (1992).

B. The FCC Should Require Disclosure Of Local Programming Content

In our initial comments, we proposed that the Commission require disclosure of political public file information on broadcasters' websites, adopt a standardized form for stations to use when reporting political advertising buys, and adopt a standard disclosure form for stations to report their local civic and public affairs programming. In these reply comments, we focus on the constitutionality of a standardized disclosure form by which stations can report, among other things, their local/civic and public affairs programming.

The Commission should adopt the disclosure requirements already proposed by the *Public Interest, Public Airwaves Coalition* in *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, MM Docket No. 00-168 (Oct. 5, 2000).[71] While the Alliance for Better Campaigns and the Campaign Legal Center anticipate that the Commission will act on the *PIPA Coalition's* proposal in the context of that proceeding, we repeat the proposal here because this NOI requests information regarding licensing procedures. The *PIPA Coalition* proposes that the disclosure form require broadcasters to report the amount and nature of programming in the following areas:

- Local civic affairs programming;
- Local electoral affairs programming;
- Independently produced programming;
- Locally oriented programming;
- Programming that serves the needs of underserved communities;
- Public service announcements (both donated and paid); and
- Religious programming.

Increased disclosure serves several important government interests: First, it assists the FCC in making the determination required by the Communications Act of whether licensees are serving the public interest. Specifically, the Commission may grant renewal of

[71] *See* Attachment B, PIPA Coalition's proposed Disclosure Form.

a license only where if finds that "during the preceding term of its license, the station has served the public interest, convenience, and necessity."[72] Second, the proposed disclosure form allows the public to assess whether broadcast stations are serving the public interest, and where appropriate, exercise the right to file petitions to deny license renewals. As the U.S. Court of Appeals for D.C. Circuit has held, "the petition to deny plays a critical role in the current regulatory scheme. Moreover, we believe that an adequate public file is essential to proper functioning of the procedures governing the petition to deny."[73] Although industry commenters would like the Commission to believe that the current petition to deny process is adequate to ensure that licensees who are not serving the public interest are not granted renewal terms,[74] in practice, it is extremely difficult to challenge a license. Increased disclosure need not be "reminiscent of the ascertainment rules" that the Commission repealed in the 1980s, as broadcasters argue.[75] Instead, a disclosure requirement would simply make it easier for members of the public to challenge licensees who do not provide local programming by giving them easy access to information about such programming, while not imposing any additional "administrative burden" upon the Commission. Third, the proposed disclosure form provides information that is useful to the Commission and the public in assessing the effectiveness of current policies.

Requiring television licensees to prepare, post, and file quarterly public disclosure forms does not raise any First Amendment problems. This proposal would neither prohibit broadcasters from airing any programming they chose nor require broadcasters to air any particular viewpoint or type of programming. The proposal merely requires that broadcasters report the quantities of different types of programming they choose to air. And although

[72] 47 USC § 309(k)(1).
[73] *Office of Communication of United Church of Christ v. FCC*, 779 F.2d 702, 710 (D.C. Cir. 1985).
[74] *See, e.g.*, Named State Broadcasters Comments at 13.
[75] NAB Comments at 4.

broadcasters would like to limit the Commission's authority to impose a disclosure requirement,[76] the FCC has clear legal authority to mandate that stations keep records of their programming.[77]

To implicate free speech issues, broadcasters would have to show that requiring disclosure compels them to air certain types of programming. They might argue, for example, that requiring a station to disclose how much local news it aired, sends the message that the station should air local news. Yet, this is simply not true. No penalty will be imposed if a station decides not to air any local news. Broadcasters argue that they should be allowed to serve their communities in whatever way they think best,[78] and the many categories on the proposed disclosure form allow them to document the myriad of ways they may provide local service.

Broadcasters are already required to disclose many different types of information about their programming.[79] No court has ever found such disclosure regulations unconstitutional. Indeed, the Supreme Court recently upheld new and expanded election-related disclosure requirements against a constitutional challenge in *McConnell v. FEC.*[80]

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[76] *Id*.
[77] *See* 47 USC §303(j); *Office of Communication of United Church of Christ v. FCC*, 779 F.2d 702, 707 (D.C. Cir.1985) ("There is no question but that the Commission has the statutory authority to require whatever recordkeeping requirements it deems appropriate").
[78] Named State Broadcasters Comments at 9.
[79] *See, e.g.*, 47 CFR §73.3526(e)(11)(i) (must prepare and place in public file a quarterly list of the station's most significant treatment of community issues) (under the Coalition proposal, the disclosure form would take the place of the issues program list); §73.3526(e)(11)(ii) (must retain records in public file sufficient to permit substantiation of compliance with commercial limits on children's programs); §73.3526(e)(11)(iii) (must place quarterly report of educational and informational children in public inspection file and file them electronically with the FCC); §73.3526(e)(14) (must put copies in public file of any agreements involving time brokerage); §73.1943 (must maintain political file that includes information about spots purchased by political candidates as well as free time provided for use of candidates); §73.1212 (must disclose when station broadcasts any matter in exchange for consideration and keep certain records relevant to sponsorship identification); and §73.3613 (identifying which contracts, including network affiliation agreements, must be filed with FCC). Other FCC regulations require various other types of disclosures. *See, e.g.,* §73.3526(e)(9) (written comments and suggestions from the public); §73.3615 (ownership reports); §73.2080(c)(6) (EEO reports).
[80] 540 U.S. 93 (2003).

First, the Court found that the requirement that broadcasters keep records of requests made by political candidates was virtually identical to existing FCC rules. Citing numerous FCC recordkeeping and reporting requirements, the Court observed that broadcaster recordkeeping requirements "run with the territory."[81] Second, the Court upheld the requirement that broadcasters keep records of requests made by any member of the public to broadcast a message about a candidate, even though this requirement was somewhat broader than the first. It noted that such "disclosure can help the FCC carry out other statutory functions, for example, determining whether a broadcasting station is fulfilling its licensing obligation to broadcast material important to the community and the public."[82] Finally, it upheld a requirement that broadcast stations keep records of requests from any member of the public to broadcast messages about "a national legislative issue of public importance" or "any political matter of national importance."[83] The Court rejected the claim that this language was too broad.[84] It also declined to conclude "that the burdens are so great, or the justifications so minimal, as to warrant" finding them unconstitutional.[85] When analyzed under this approach, it is clear that each of the disclosure requirements proposed by the *PIPA Coalition* would be found constitutional.

C. The FCC Should Amend License Procedures To Include Processing Guidelines

In addition to a standardized disclosure form, we urge the Commission to adopt the processing guidelines proposed by the *PIPA Coalition.* The *PIPA Coalition's* proposed processing guidelines would allow for expedited license renewal for licensees that air a minimum of three hours per week (at least half of which would air in or near prime time) of

[81] *Id.* at 234.
[82] *Id.* at 239, citing 47 U.S.C. §315(a).
[83] *Id.* at 240, quoting 47 U.S.C.A. §315(e)(1)(B).
[84] *Id.*
[85] *Id.* at 242.

local civic or electoral affairs programming on the most-watched channel they operate. In the six weeks prior to a general election, at least two hours of the three-hour minimum would have to be local electoral affairs programming.[86] A formal processing guideline for locally oriented programming is a vital incentive to support adequate service to the public. Such a guideline would encourage broadcasters to air more locally focused programming, without adding to the Commission's burden in license renewal processing or abridging broadcasters' First Amendment rights.

The Commission has always had "the power to make license determinations on the basis of programming,"[87] and one type of programming it should base license renewals on is locally oriented programming. Processing guidelines would incentivize local programming by allowing broadcasters who certify that they have met the guideline to have their licenses renewed with only staff level review. License renewal applications of broadcasters who do not fulfill the guidelines' specifications would be reviewed by the full Commission.[88]

The FCC has authority to renew broadcast licenses only where such renewal is in "public interest," and can establish what is in the "public interest" either on a case-by-case basis or through rulemaking. The processing guideline represents a reasonable, viewpoint neutral method of determining whether a licensee has served the Commission's public interest goals. It does not censor or foreclose speech of any kind, nor does it tell licensees what topics they must address. The use of guidelines makes it easy for licensees to demonstrate that they have met their public interest obligations. Processing guidelines are superior to a case-by-case approach because they provide greater certainty to broadcasters.

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[86] *See* Attachment B, PIPA Coalition Processing Guidelines proposal.
[87] *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1423 (D.C. Cir. 1983) (quoting *FCC v. Pottsville Broadcasting Co.* at 1428).
[88] The PIPA Coalition has recommended a quantitative standard that proposes a minimum of three (3) hours per week be allocated to local civic or electoral affairs programming. This proposal is modeled after the three-hour rule in the Children's Television Act. Qualifying programming must meet the criteria of either local civic programming or local electoral affairs programming outlined in the proposal.

At the same time, they are less intrusive because they allow broadcasters the flexibility to serve the public interest by other means.

The Commission used formal processing guidelines to assess all radio and television license renewals from the early 1970s to the early 1980s.[89] Prior to 1973, informal guidance to the staff served a similar function.[90] These processing guidelines were never challenged in court as being unconstitutional. In 1996, the FCC adopted similar processing guidelines, which are still in use today, to assess whether television stations are adequately serving the educational and informational needs of children.[91] In adopting these guidelines, the FCC considered at length whether processing guidelines would violate First Amendment, and concluded that they did not.[92] The constitutionality of the children's processing guidelines were also never challenged in court.

The guidelines proposed by the *PIPA Coalition* would not run afoul of the Constitutional prohibition on restrictions of speech. In the broadcasting arena, regulations of speech are not subject to heightened scrutiny, although the industry commenters suggest otherwise.[93] Instead, regulations pertaining to the broadcast industry need only pass a reasonableness test.[94] Industry commenters argue that processing guidelines amount to a mandate to produce programming that broadcasters believe will please the Commission in violation of the First Amendment.[95] Although the Supreme Court acknowledged that at

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[89] *See, e.g.*, *The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 FCC 2d 1076, 1078 (1984).
[90] *Id*.
[91] *Policies and Rules Concerning Children's Television Programming,* 11 FCC Rcd 10,660 (1996).
[92] *Id*. at 10,728-33.
[93] *Turner Broadcasting System, Inc., v. FCC*, 512 U.S. 622, 637 (1994).
[94] For example, the Named State Broadcasters Associations state that FCC regulations must provide the "least-restrictive means of achieving their goals." Named State Broadcasters Comments at 16. However, broadcasting regulations are evaluated under a lesser standard of review. *See, e.g.*, *National Broad. Co., Inc. v. United States*, 319 U.S. 190, 226 (1943); *CBS, Inc. v. FCC*, 453 U.S. 367, 394-95 (1981); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 799 (1978).
[95] NAB Comments at 64.

times the public interest might even require imposition of content requirements or restrictions,[96] the Commission would not be imposing an affirmative obligation on broadcasters through the use of processing guidelines. Broadcasters would be free to serve their local communities in many other ways, and could present their local service to the Commission during renewal proceedings. Processing guidelines would simply institute rules rather than case-by-case reviews to make this determination, providing greater certainty and administrative ease.

[96] "The inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees." *Turner*, 512 U.S. at 638.

CONCLUSION

In order to ensure that broadcasters serve the public interest, we request that the Commission act quickly to create rules that encourage such service. Localism will be best served when the FCC assesses the current marketplace through comment received in this docket, localism hearings and reports commissioned by the agency, and initiates a rulemaking proceeding to develop regulations that enhance broadcasters' service to local communities. Localism in broadcasting will be further enhanced with the use of a standardized disclosure form and processing guidelines as part of license renewal proceedings. We respectfully request that the Commission begin a localism rulemaking and act expeditiously to implement a standard disclosure form and processing guidelines, as proposed by the *PIPA Coalition* in other dockets.

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